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Supreme Court, U.S.
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No. 89-1691

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SERENA DUNN, at al.,

Petitioners,

v.

THE FLORIDA BAR,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the application of the second prong of the Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), test, used for determining whether the defendant's conduct was "not required by law," by the trial court proper in this case where there was no judicial determination on the merits of the plaintiffs' claim at the time the plaintiffs voluntarily decided to terminate the litigation and there existed the assertion by the defendants that there was no constitutional or statutory right underlying the plaintiffs' claim?

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STATEMENT OF THE CASE

As pointed out by the Eleventh Circuit Court of Appeals in its opinion, "[t]his case began life in another form." Dunn v. The Florida Bar, 889 F.2d 1010, 1011 (11th Cir. 1989). This case is a continuation of the so far never ending battle between Ms. Rosemary Furman, and other nonlawyers, who desire to conduct commercial, for profit enterprises providing legal services to the public. Florida's history with this issue can be found in such cases as The Florida Bar v. Furman, 451 So.2d 808 (Fla. 1984); The Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979); The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978); and The Florida Bar v. American Legal and Business Forms, Inc.,

274 So.2d 225 (Fla. 1973). These cases concerned the extent nonlicensed individuals could operate without violating Florida's unlicensed practice of law (UPL) rules in the conduct of their commercial businesses.

During the last prosecution of Ms. Furman by the Florida Bar, one of Ms. Furman's reputed "clients", Serena Dunn, filed a class action against the Florida Bar and the Supreme Court of Florida in the United States District Court for the Middle District Court of Florida in Jacksonville. The class consisted of those individuals who desired a divorce but, for whatever reason, could not obtain a lawyer, either for a fee or pro bono, and did not feel comfortable in attempting to complete the necessary court papers

before appearing pro se before a judge. 1/

1/ While this litigation was in progress, the Florida Bar proposed and the Supreme Court of Florida approved a new simplified dissolution procedure. The proposal became Rule 1.611(c), Florida Rules of Civil Procedure along with the Rule's accompanying forms, Forms 1.943(b) through 1.934(e), Florida Rules of Civil Procedure. See, Amendment to the Florida Rules of Civil Procedure, 450 So.2d 817 (Fla. 1983). However, this simplified procedure, and the accompanying forms, was restricted to those persons seeking a divorce who had (a) agreed to the divorce, (b) had no minor children or the wife was not then pregnant, (c) had agreed to the joint division of their property, and (d) had agreed to the payment of the joint financial obligations. Consequently, those cases involving contested divorces, contested property settlement, custody and support of children or contested obligations on the couple's joint debts could not use the simplified procedure. After the proposed Rule was approved, the Petitioners agreed that the rule did not affect their class as the vast majority of the class had children or were involved in a contested divorce. Therefore, this new Rule did not materially help the class or resolve the issues before the District Court.

The Petitioners' Class sought to challenge Florida's enforcement of its UPL rules against such nonlawyer, for profit, commercial services. If, as the Petitioners' reasoned, Florida's rules were struck, they could continue their commercial business operations without any interference of the Florida Bar and the Supreme Court of Florida.

The Petitioners' contention before the District Court was that Florida's UPL rules denied the Petitioners access to the courts in violation of the equal protection and due process clauses of the Fourteenth Amendment. What were <u>not</u> presented as issues to the District Court were:

> 1. a claim that Florida barred the Petitioners from utilizing the Florida court system in any manner

or prevented them from presenting their cases pro se; or

2. a claim that Florida was preventing the Petitioners from seeking assistance from friends, neighbors or family members in the preparation of their legal questions.

The only issue before the District Court was the legality of Florida's UPL rules preventing nonlawyer, commercial, for profit businesses operating to "assist" members of the public to obtain certain legal results for a fee from the Petitioner class.

Respondents vigorously opposed Petitioners' contentions because, Respondents asserted, there was no constitutional right or other legal requirement placed on the Respondents to provide the Petitioners' class access to

commercial, for profit, but nonlicensed laypersons, to assist the Petitioners in obtaining a divorce. 2/

During the course of this proceeding, the Respondents, in a desire to loosen the restrictions placed on laypersons in the Brumbaugh decision, and reaffirmed in the Furman I decision, modified the UPL rules to permit limited oral communication with the public by nonlicensed person. Amendment to the Rule Regulating the Florida Bar (Chapter 10), 510 So.2d 596

2/ Ironically, even if the Petitioners could have been "assisted" in preparing their papers for a divorce by one of these nonlawyer, for profit, businesses, the Petitioners would still be required to appear pro se in court as the nonlicensed laypersons are not permitted to represent the Petitioners' class in court, a status the Petitioners never challenged in court.

(Fla. 1987). But, this communication was

> restricted to those communications reasonably necessary to elicit factual information to complete the [legal] form(s) [approved by the Supreme Court of Florida] and inform the individual how to file such form(s). (emphasis supplied)

Rule 10-1.1(b), Rules Regulating the Florida Bar. After this change, nonlicensed persons could elicit factual information to fill in the blanks on court approved forms but do nothing else such as the selection of the proper forms or the procedure to be followed in court.

At the time of the proposed rule change, no forms were submitted by the Florida Bar to the Supreme Court for approval. While the Supreme Court of Florida then directed the Florida Bar to draft such forms for the future, besides

the simplified dissolution forms (Forms 1.943 (b) through 1.943(e))in existence before the UPL rule change, no such forms concerning the dissolution of a marriage have been submitted to or approved by the Supreme Court of Florida. Therefore, since Petitioners' class cannot utilize the simplified dissolution procedure of Rule 1.611(c), Florida Rules of Civil Procedure, there have never been any court approved forms that the Petitioners could take to a nonlicensed layperson to fill

out in securing a dissolution. 3/

Shortly after the Supreme Court approved the rule change, Petitioners unilaterally decided they had the relief they desired and sought out the Respondents with their decision that the case was now moot. Dunn, 889 F.2d at 1013 [describing Petitioners' counsel letter of

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3/ This continues to be a major bone of contention between the Petitioners and the Respondents. Petitioners' counsel believes the change to Rule 10-1.1(b), Rules Regulating the Florida Bar, permits the nonlicensed layperson to complete any form contained in the Florida Rules of Court (West Pub. Co. 1989). In particular, Petitioners believe a nonlicensed layperson can take Form 1.943(a) (copy in the appendix) and fill in all the information necessary for the Petitioners to secure a divorce. The Respondents have consistently taken the position that the use of Form 1.943(a) by a nonlicensed layperson will result in that persons prosecution for the unlicensed practice of law.

July 27, 1987 to Respondents' counsel]. The Petitioners proposed to the Respondents that the case was moot and there would be no need to go forward with a trial on the merits. Id. They requested that the Respondents join in a stipulated dismissal of the case. Since the Respondents saw no reason to go forward if the Petitioners desired to end the litigation, they agreed to a dismissal but inserted into the agreement a statement that the Respondents asserted that the Petitioners were not a prevailing party.

So, contrary to the impression made by the Petitioners throughout their Petition, there was no settlement as one commonly understands the term. There was but an

agreement by the Respondent to allow dismissal of the suit if the Petitioners did not desire to go forward with their case. The signed stipulation nor the understanding of the parties addressed the merits of the case nor was it a concession by the Respondents that the petitioners acquired anything they sought in the rule change. Both the District Court and the Court of Appeals saw the stipulated dismissal for what it really was, a voluntary dismissal by the Petitioners. See, Dunn v. The Florida Bar, 726 F.Supp. 1261, 1267 (M.D. Fla. 1988) and 889 F.2d at 1012.

In response to the Petitioners' motion for fees, the Respondents immediately set forth their reasons why the Petitioners

were not a prevailing party. The Respondent Supreme Court emphasized the point that the Petitioners had never established the fact that there even existed a constitutional right for the Petitioners to use nonlicensed laypersons in securing legal services.

In an attempt to see if the Petitioners were a prevailing party, the District Court had to determine if the acts done by the Respondents outside of the scope of the lawsuit was required by law. The District Court was left with no alternative but to make a legal determination, based on the facts in the record. The District Court found that the Petitioners were not prevailing because there existed no right in the Petitioners

nor a duty in the Respondents to see to it that the Petitioners were provided with nonlicensed layperson legal assistance they could afford.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS OR OF THIS COURT

1. THE ANALYSIS APPLIED BY THE COURT OF APPEAL BELOW IS IN LINE WITH THE ANALYSIS APPLIED BY THIS COURT AND THE OTHER COURTS OF APPEAL.

This case involved the termination of the litigation by the Petitioners before there was any judicial determination of the merits raised by the Petitioners. In attempting to reach the decision whether the Petitioners were a "prevailing party" under 42 U.S.C. Section 1988, the Petitioners attempt to leave the impression with this Court that the Court of Appeals below used a form of analysis, to determine "prevailing party" status,

not used by this Court or nine of the other courts of appeal. This impression is misleading.

To understand the analysis applied by the Court of Appeals, we must begin with the underlying intent of the Civil Rights Attorney's Fees Award Act, 42 U.S.C. Sec. 1988. The very basis of an award of attorney's fees is the vindication of a constitutional or statutory right. Smith v. Robinson, 468 U.S. 992, 1006 (1984); Maine v. Thiboutot, 448 U.S. 1, 9 (1980). Only one who prevails in protecting such rights is entitled to an award of fees. Texas State Teachers Association v. Garland Independent School District, ___ U.S. ___, 109 S. Ct. 1486, 1491 (1989).

Stated otherwise, fees are awardable:

> only to a party who has established his entitlement to some relief on the merits of his claim, either in the trial court or on appeal.

Hanrahan v. Hampton, 446 U.S. 754, 757 (1980).

In a typical case concerning a determination of whether the plaintiff is a "prevailing party" the courts often look to see if the plaintiff has "at least received some relief on the merits of his claim before he can be said to prevail." Hewitt v. Helms, 482 U.S. 755, 760 (1987). As this Court has stated, relief must result in the material alteration of the legal relationship between the plaintiff and the defendant. Texas State Teachers Association, ___ U.S. at ____, 109 S.Ct. at 1493. Consequently, "Section 1988 simply

does not create fee liability where merits liability is nonexistent." Kentucky v. Graham, 473 U.S. 159, 168 (1985).

Relief is not restricted only to those decisions resulting from final judgments. A party can be a prevailing party by resolving a case through a consent decree, settlement or voluntary cessation of unlawful conduct by the defendant. See, E.g., Hanrahan v. Hampton, 446 U.S. at 757.

But all these cases in which a termination of the proceeding occurred prior to a judicial decision assume that in each case there exists a constitutional or statutory right which the plaintiff is attempting to vindicate. But, what if, as happened throughout this case, there is

the allegation that no such constitutional or statutory right or legal obligation existed; that the actions of the defendant were not required by any law? How does one determine if the result achieved is worthy of an award of attorney's fee?

The first court to look at that question and form an analytical test was the First Circuit Court of Appeals in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). There the First Circuit articulated a two-prong test to determine if an award of fees was appropriate in a case where no judicial determination on the merits was reached. The first prong of the test was whether the plaintiff was the causal factor in achieving the end result. Nadeau v. Helgemoe, 581 F.2d at

280-81. This is strictly a factual test. Id. The second prong to the test was a "legal" as well as factual analysis. Id., 581 F.2d at 281. The court decided that the plaintiff must not only show that factually his action precipitated the beneficial result but that, even with the beneficial result, if the

> defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense. (emphasis added)

Id. The court of appeal decided it was proper for the district court to decide that question, based upon the facts and law of the case before it, under traditional constitutional theory. Id.

Nadeau ended up being the seminal case on this question. Its two-prong test, with the "not required by law" standard, has been nearly universally accepted by all the other Circuits. 4/ In fact, not only did the Eleventh Circuit Court below follow it, but of the Petitioners' cited so-called circuits in opposition to the Eleventh Circuit's citation of the "not required by law" test, the following Circuits have expressly adopted the Nadeau two-prong test, and its "required by law" standard, in their attorney's fees

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4/ Nadeau's second prong of its two-prong test has not been adopted by only the Second, Third or Fourth Circuits. This difference in the two lines of cases determining "prevailing parties" was noted in Chief Justice Rehnquist's dissenting opinion in Long v. Bonnes, 455 U.S. 961, 966-67 (1982).

decisions: Fifth Circuit - Hennigan v. Ouachita Parish School Board, 749 F.2d 1148, 1151 (5th Cir. 1985), Garcia v. Guerra, 744 F.2d 1159, 1162 (5th Cir. 1984) and Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982); Sixth Circuit - Webster v. Sowders, 846 F.2d 1032, 1037 (6th Cir. 1988) and Johnston v. Jago, 691 F.2d 283, 286 (6th Cir. 1982); Seventh Circuit - Palmer v. City of Chicago, 806 F.2d 1316, 1322 (7th Cir. 1986) (there are a number of other Seventh Circuit cases that expressly adopt the Nadeau two-prong test without expressly stating the "required by law" phrase. See, e.g., Lovell v. City of Kankakee, 783 F.2d 95, 97 (7th Cir. 1986)); Eighth Circuit - United Handicapped Federation v.

Andre, 622 F.2d 342, 346 (8th Cir. 1980) (Nadeau two-prong test reaffirmed in Premachandra v. Mitts, 727 F.2d 717, 721 (8th Cir. 1984), rev'd on other grounds, 753 F.2d 635 (8th Cir. 1985); Ninth Circuit - Greater Los Angles Council on Deafness v. Community Television of Southern California, 813 F.2d 217, 220 (9th Cir. 1987) and California Association of the Physically Handicapped v. F.C.C, 721 F.2d 667, 671-672 (9th Cir. 1983); Tenth Circuit - Goichman v. City of Aspen, 859 F.2d 1466, 1471 (10th Cir. 1988) and J & J Anderson, Inc. v. Town of Erie, 767

F.2d 1469, 1473 (10th Cir. 1985). 5/ The District of Columbia Circuit has adopted the Nadeau test without stating the "required by law" language. Grano v. Barry, 783 F.2d 1104, 1110 (D.C. Cir. 1986).

The error of Petitioners' argument is the belief that the analysis applied by the Eleventh Circuit Court of Appeals in this case is different from that applied in the Nadeau decision and by the other Circuits. What we have in fact is but one standard but one that is often stated in different terms. Thus, stated as a

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5/ The First Circuit has continued to follow its earlier two-prong test in Nadeau along with its "required by law" language. See, Ortiz De Arroyo v. Barcello, 765 F.2d 275, 282 (1st Cir. 1985).

cliche, the analyses applied by all these court are but "different sides of the same coin." The courts have cited both the "required by law" and the "frivolous, unreasonable, or groundless" language from Nadeau, using such a phrase as "stated otherwise" when setting forth both Nadeau statements. See, Sablan v. Department of Finance of North Mariana Islands, 856 F.2d 1317, 1325 (9th Cir. 1988).

While some Circuits do use the phrase "frivolous, unreasonable, or groundless" in determining whether the plaintiff's claim states a legal claim, other Circuits used such terms as "arguably supported by case or statutory law" (Garcia v. Guerra, 744 F.2d at 1163), "legal basis" (Sablan, 856 F.2d at 1325; California Association

of the Physically Handicapped, 721 F.2d at 672); "minimum basis in law" (Miller v. Staats, 706 F.2d 336, 342 (D.C. 1983); Johnson v. Jago, 691 F.2d at 286) or "colorable civil rights claim" (Grano v. Barry, 783 F.2d at 1110) to describe the showing the plaintiff must make in order to be deemed a "prevailing party." 6/

Therefore, contrary to the Petitioners' assertions, the Eleventh Circuit below applied the same standard or test adopted or utilized by the other Circuit Courts of Appeal. The "not required by law" test of Nadeau, stated in

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6/ Even Chief Justice Rehnquist used the phrase "some basis in law" to describe the minimum legal threshold level the plaintiff must present in order to be entitled to an award of attorney's fees. Long v. Bonnes, 455 U.S. at 967.

its various forms, is nearly uniform throughout the United States and there exist no division among the courts of appeal using the Nadeau two-prong test. 7/

2. THE DECISION BELOW DOES NOT CONFLICT WITH THE PURPOSES OF SEC. 1988

The Petitioners next assert that the decision below conflicts with the underlying purpose of Section 1988 by requiring the Petitioners to show to the court what constitutional or statutory

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7/ Thus the "only" conflict that really does exist is the conflict between the Nadeau line of cases and the Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), remanded, 651 F.2d 214 (4th Cir. 1981), cert. denied, 455 U.S. 961 (1982), line of cases.

right was violated by the Respondents and vindicated by the Petitioners.

Petitioners misunderstand the meaning of the lowers courts' decisions. The decisions do not reflect a requirement the a plaintiff show that he would "prevail" on the merits; rather, the decision was but an exercise in determining whether there even existed a constitutional right upon attorney's fees could be awarded to a plaintiff. This form of analysis applied in this case has been applied by many of the other Circuit Courts of Appeal in order to determine if the plaintiff was a prevailing party in a case terminated prior to a judicial determination. See, Goichman v. City of Aspen, supra; Sablan v. Department of Finance of North Mariana

Islands, supra; Garcia v. Guerra, supra; Johnston v. Jago, supra.

Here the Court of Appeal reached the conclusion that no such constitutional right existed and that, had the Petitioners continued, they would have not won. The Court of Appeals did this by restricting itself to the facts in the record and the clear statement of the law. However, if the Court of Appeals had found that such a constitutional right had been established, then the inquiry would have ceased as the Petitioners would have been entitled to fees as the prevailing party.

The Respondents are not in any way challenging the holdings of this Court that attorneys fees are awardable at the end of a settlement or upon unilateral

action by a defendant. Rather, only that "when" a settlement or other non-judicial resolution is reached, there existed a recognizable constitutional or statutory right upon which the plaintiff bases his action against a defendant. Anything less would permit an award of fees irrespective of the existence of a constitutional right and contrary to this Court's position that Section 1988 not permit fees where no merits liability exists. 8/ Kentucky v. Graham, 473 U.S. at 168.

8/ And as Justice Brennan observed in Hensley v. Eckerhart, 461 U.S. 424, 446 (1983), Section 1988 is not a "relief fund for lawyers," rather requiring that the plaintiff be a "prevailing party." Therefore, the existence of a constitutional right upon which a plaintiff bases his claim is mandatory. Otherwise, Section 1988 would digress into a lawyer relief act. See also, Kentucky v. Graham, 473 U.S. 159, 168 (1985).

3. THE DECISION OF THE COURT OF APPEAL DOES NOT CONTRAVENE THE PUBLIC POLICY FAVORING SETTLEMENTS

The Petitioners present the argument that the decision of the Court of Appeals undermines the public policy encouraging settlements. This assertion is baseless.

To repeat, this was <u>not</u> a case concerning a settlement. This was a case involving a voluntary dismissal by the Petitioners and then a unilateral claim of victory coupled with a claim for attorney's fees. This is far from the situation of a negotiated settlement where both sides sit down to resolve their differences. Rather, this was a frivolous case from the beginning with the Petitioners claiming victory and then

seeking fees for bringing such an action.

Contrary to the Petitioners' assertions, an award of fees under the conditions presented here (a claim not based upon any established constitutional or statutory right and the denial of the court to determine the validity of the asserted claim) will surely lead defendants to refused to do anything at all until the case is brought to a final conclusion proving their point. This action would be contrary to the intent of Congress in simply having defendants dispose of frivolous cases without liability for attorney's fees.

Therefore, in a case where the legal claim being asserted is questionable, defendants will litigate the issue until

the end to prove that their conduct was "not required by law" or that the plaintiff's action was "frivolous, unreasonable or groundless" in order not to be subject to an award of attorney's fees.

The Petitioners' citations of Hensley v. Eckerhart, 461 U.S. 424 (1983), Long v. Bonnes, 455 U.S. 961 (1982) and Garcia v. Guerra, 744 F.2d 1159 (5th Cir. 1984) are misplaced. In Hensley, the district court, after a trial on the merits, found the defendants had violated the Constitution on five of the six grounds asserted. The issue before the Court concerned the legality under Section 1988 of awarding fees for time spent on the unsuccessful claims.

In Bonnes, Chief Justice Rehnquist stated that a trial was not necessary to determine attorney fees but he also approved of the Nadeau two-prong test analysis and the finding of the First Circuit Court that a district court will in most cases have a complete enough record to reach the legal conclusion whether or not plaintiff possessed some basis in law to bring the action or the defendant was required by law to alter his conduct. Long v. Bonnes, 455 U.S. at 966 n.3.

Finally, the Fifth Circuit in Garcia v. Guerra, while also stating a trial on the merits is not necessary to determine attorney's fees, did state a standard the district courts were to follow. Based

upon the facts in the record before it, a district court could determine the eligibility for fees by merely looking at the plaintiff's claim and see if it was "arguably supported by case or statutory law." Garcia v. Guerra, 744 F.2d at 1163.

It was exactly this standard ("arguably supported by case or statutory law) that the District Court used to determine if the Petitioners' claim entitled them to fees. Dunn, 726 F.Supp. at 1270 and 1275.

The decision below is consistent with the policy of settlements and does not require a court to have a trial on the merits to determine if attorney's fees are awardable to the plaintiffs.

4. THE DECISION OF THE COURT OF APPEALS DOES NOT DO DAMAGE TO THE "CASE OR CONTROVERSY" REQUIREMENT OF ARTICLE III, SECTION 2 OF THE CONSTITUTION

Finally, Petitioners assert that the decision of the Court of Appeals does violence to the "case" or "controversy" requirement of Article III, Section 2 of the Constitution by permitting the federal courts to make decisions on the merits of the Petitioners' claims during the attorney's fees portion of the case. If this assertion were accepted practice, the federal courts would be unable to determine the legal basis of a plaintiff's claim when the case ends in a voluntary dismissal.

The Petitioners begin their argument by claiming they were not seeking to impose "a constitutional obligation to provide lay assistance" to Petitioners. Petition for a Writ, p.16. Rather they were seeking an injunction to prevent Florida from enforcing its UPL rules against lay assistants. 9/ Id.

The decision of the Court of Appeals was not given to effect an "advisory opinion" but made in order to decide whether the Respondents' action in amending their UPL rules was "required by law" entitling the Petitioners to an award

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9/ Ironically, on its face, Petitioners admit they presented no constitutional claim to the District Court. Furthermore, no court has ever found a constitutional violation in the application of UPL laws against nonlicensed persons admittedly practicing law.

of attorney's fees. However, to deny this ability of review to the courts would prevent the courts from determining if in fact a constitutional or statutory right was violated.

CONCLUSION

For the reasons given above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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